

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIMON J. BRITTINGHAM,	§
	§
Defendant Below-	§ No. 490, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0706025320
Plaintiff Below-	§
Appellee.	§

Submitted: December 3, 2010

Decided: February 1, 2011

Before **HOLLAND, BERGER, and JACOBS**, Justices.

ORDER

This 1st day of February 2011, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Simon Brittingham, filed this appeal from the Superior Court's sentence for his third violation of probation (VOP). He contends that he was denied due process, his sentence was excessive, and the Superior Court failed to credit him with all the time he previously served on the underlying sentence. We find no merit to any of Brittingham's arguments. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that Brittingham pled guilty on January 3, 2008 to one count each of possession of a deadly weapon by a person prohibited (PDWPP)

and possession with intent to deliver marijuana. The Superior Court immediately sentenced him, effective June 20, 2007, as follows: (i) PDWPP—three years at Level V incarceration, to be suspended immediately for time served, followed by two years at Level IV home confinement, to be suspended after serving six months for eighteen months at Level III probation; and (ii) possession with intent to deliver—three years at Level V incarceration, to be suspended for an eighteen month concurrent term at Level III probation. He did not appeal his convictions or sentence.

(3) Thereafter, Brittingham was twice found in violation of the terms of his probation and sentenced in April 2009 and again in August 2009. Brittingham did not appeal from either sentence. On July 14, 2010, the Superior Court found Brittingham guilty of this third probation violation. The Superior Court sentenced Brittingham, effective July 14, 2010, to serve the following: (i) PDWPP—three years at Level V incarceration with credit for one year, three months and eight days previously served; and (ii) possession with intent to deliver—three years at Level V incarceration, to be suspended for six months at Level IV work release or home confinement followed by one year at Level III probation. This appeal followed.

(4) In his opening brief on appeal, Brittingham first argues that there were no aggravating circumstances in his case to justify the Superior Court's sentencing in excess of the SENTAC guidelines. Second, he contends that the VOP

proceedings violated his right to due process because he was not given the opportunity to consult with counsel prior to the hearing and because the trial judge did not give his counsel or his probation officer the chance to make a sentencing recommendation on his behalf. Finally, Brittingham contends that he was not given credit for all the time he previously served on the sentence.

(5) With respect to this last issue, we take judicial notice that the Superior Court, on September 1, 2010, modified Brittingham's sentence in order to credit him with an additional 90 days, which Brittingham had served at the VOP Center following his second VOP. Accordingly, Brittingham now has been credited with all time served on his underlying sentence. This issue, therefore, is moot.

(6) This Court's appellate review of a sentence is extremely limited. Our review generally ends upon a determination that the sentence is within the statutory limits prescribed by the legislature.¹ In sentencing a defendant for a VOP, the trial court is authorized to impose any period of incarceration up to and including the balance of the Level V time remaining to be served on the original sentence.² In this case, following Brittingham's second VOP sentence, there were almost four and a half years from Brittingham's original sentence that the Superior Court could have reimposed after finding Brittingham guilty of his third VOP. After crediting him with all time previously served, the Superior Court sentenced Brittingham to

¹ *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

² 11 Del. C. § 4334(c).

less than eighteen months at Level V incarceration for his third VOP. Thus, the sentence imposed by the Superior Court was authorized by law, and we conclude that it was neither arbitrary nor excessive.

(7) Furthermore, because Brittingham failed to order and provide this Court with a copy of the transcript from his VOP hearing, there is no basis upon which the Court can review his claims that he was denied due process at the VOP hearing.³ As the Court has held many times, the failure to include adequate transcripts of the proceedings, as required by the rules of the Court, precludes appellate review of a defendant's claims of error in the proceedings below.⁴

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

³ See *Hawkins v. State*, 2010 WL 3341578 (Del. Aug. 25, 2010) (holding that failure to provide transcript of VOP hearing precludes review of argument on appeal).

⁴ *Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987).